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TO AMEMBASSY BONN NIACT IMMEDIATE

INFO AMEMBASSY BERLIN

AMEMBASSY LONDON

AMEMBASSY PARIS

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C O N F I D E N T I A L STATE 021037

E.O. 11652: GDS

TAGS: PGOV, PFOR, CONS, WG, EG

SUBJECT: CONSULAR AGREEMENT WITH GDR: GERMAN NATIONALS

REF: BONN 1369

USUN FOR AMBASSADOR KEARNEY - UNCITRAL WKG GROUP

1. SUMMARY. DEPT STUDY, NOW BEING REVIEWED, CONCLUDES
THAT U.S. CAN MEET SOME OF FRG CONCERNS REGARDING ITS
PROTECTION OF EAST GERMANS WHO REQUEST FRG ASSISTANCE.
INTERIM RESPONSE TO FRG MAY BE MADE.

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COMMENTS ON PRELIMINARY CONCLUSIONS WELCOME. END SUMMARY.

2. DEPT STUDY OF CONSULAR RIGHTS OF F.R.G. IN U.S. HAS FOCUSED ON WHO IS "NATIONAL" OF F.R.G. UNDER THE RELEVANT U.S.-F.R.G. CONSULAR AGREEMENTS, INCLUDING, IN PARTICULAR, ARTICLE III(2) OF THE 1954 FCN (TIAS 1839), WHICH DEALS WITH RIGHTS OF CONSULS REGARDING ARRESTED NATIONALS. (STUDY BEING POUNDED BONN/PFUND AND USBERLIN/GREENWALD). STUDY CONCLUDES THAT F.R.G. DOES NOT HAVE CONSULAR RIGHTS WITH REGARD TO ALL GERMAN NATIONALS, BUT ONLY THOSE WHO MAY BE CONSIDERED F.R.G. NATIONALS, THE CONCEPT WHICH IS USED IN OUR AGREEMENTS. NEVERTHELESS, GIVEN F.R.G. NATIONALITY AND OTHER LAWS, ANY GERMAN WITHIN MEANING OF F.R.G. BASIC LAW WHO WISHES TO ASSOCIATE HIMSELF WITH THE

F.R.G. WOULD SEEM TO HAVE ACQUIRED F.R.G. NATIONALITY, AS THAT CONCEPT IS USED IN U.S.-F.R.G. CONSULAR AGREEMENTS. THERE THUS WOULD BE, IN ESSENCE, A DUAL CITIZENSHIP CLAIM SITUATION AND CONCURRENT F.R.G./G.D.R. JURISDICTION OVER AN ARRESTED GERMAN, HOLDER OF AN EAST GERMAN PASSPORT, WHO REQUESTS F.R.G. CONSULAR PROTECTION. SPECIAL CONDITIONS IN EASTERN EUROPE MAKE IT UNDESIRABLE FOR US TO INCLUDE IN U.S.-G.D.R. CONVENTION PROVISION THAT CONSUL'S RIGHT TO NOTICE AND VISIT DEPENDS ON WILL OF THE ARRESTED PERSON.

3. WE CONSIDERING MAKING FOLLOWING RESPONSE HERE TO F.R.G. EMBASSY'S DEMARCHES: (A) IF WE HAVE PROPERLY UNDERSTOOD F.R.G. LAWS, ANY GERMAN WITHIN THE MEANING OF ARTICLE 116 OF THE BASIC LAW, WHO SEEKS TO ASSOCIATE HIMSELF WITH THE F.R.G. AND ITS INSTITUTIONS, IS IN THE SAME LEGAL RELATIONSHIP TO THE F.R.G. AS CITIZENS ARE TO STATES GENERALLY; (B) POSSESSION OF AN F.R.G. PASSPORT IS NOT REQUIRED FOR THIS RELATIONSHIP TO EXIST AND POSSESSION OF ANY OTHER PASSPORT DOES NOT PRECLUDE IT; (C) ON THIS BASIS, WE WOULD AGREE THAT ANY PERSON IN THE UNITED STATES WHO IS A GERMAN NATIONAL WITHIN THE MEANING OF THE BASIC LAW AND SEEKS TO AVAIL HIMSELF OF THE RIGHTS OFFERED SUCH PERSONS UNDER THE F.R.G. LAWS, IS A "NATIONAL" OF THE F.R.G. WITHIN THE MEANING OF OUR CONSULAR AGREEMENTS; (D) IT HAS LONG BEEN U.S. POLICY IN EASTERN EUROPE COUNTRIES

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TO SEEK AN UNCONDITIONAL RIGHT TO PROVIDE CONSULAR SERVICES TO U.S. NATIONALS AND NOT TO LIMIT THIS RIGHT BY AGREEING TO MAKE THE ARRESTED PERSON'S WILL DETERMINATIVE ON THE QUESTION OF NOTICE AND VISITS. IN ORDER TO ENSURE OUR ACCESS IN GDR, WE COULD NOT DENY TO THE GDR AT LEAST CONCURRENT JURISDICTION OVER A DETAINED GERMAN WHO IS A GDR CITIZEN UNDER THE LAW, EVEN IF HE SEEKS FRG CONSULAR PROTECTION; (E) IN VIEW OF THE SIZE AND ORGANIZATION OF

THE UNITED STATES POLICE AND PENAL SYSTEM, AND, IN PARTICULAR THE FEDERAL NATURE OF THE U.S., WE CANNOT GUARANTEE THAT NOTIFICATION OF F.R.G. CONSULAR OFFICERS WILL ALWAYS OCCUR FOR PERSONS IN SUCH A SITUATION, ALTHOUGH WE WILL SEEK TO ASSURE THAT IT DOES; (F) SINCE DEFINITIONS OF "NATIONAL" ARE NOT NORMALLY INCLUDED IN U.S. CONSULAR AGREEMENTS, NOR HAVE THEY BEEN INCLUDED IN G.D.R. CONSULAR AGREEMENTS UNTIL RECENTLY, WE WILL RESIST INCLUDING A DEFINITION IN THE U.S.-G.D.R. AGREEMENT.

4. FYI. WE ALSO CONSIDERING THAT IT MAY BE POSSIBLE, IF THE F.R.G. WISHES, TO HAVE A SUITABLE EXCHANGE OF NOTES WHICH WILL RECORD OUR SHARED INTERPRETATION OF THE CONCEPT "NATIONAL" OF THE F.R.G." AS IT IS USED IN U.S.-F.R.G. CONSULAR AGREEMENTS. HOWEVER, A PUBLISHED WRITTEN EXCHANGE WOULD MAKE IT MORE DIFFICULT TO JUSTIFY A REFUSAL TO INCLUDE SOME TYPE OF DEFINITION OF G.D.R. NATIONAL IN THE U.S.-G.D.R. CONSULAR AGREEMENT.
END FYI

5. WE UNDERSTAND POLITICAL ISSUE BEHIND THE FRG REQUEST TO US FOR ASSURANCES ON THE CONSULAR REPRESENTATION ISSUE WHICH THEY CAN PUBLICLY AIR IN BUNDESTAG AND THE PRESS. UNTIL ABOVE STUDY HAS BEEN COMPLETED AND APPROVED, HOWEVER, WE BELIEVE ANY PUBLIC RESPONSE SHALL BE LIMITED TO GENERAL STATEMENT. WE WOULD PROPOSE FOLLOWING RESPONSES: (A) USG IS AWARE OF FRG CONCERNS WHICH IT VIEWS SYMPATHETICALLY AND WHICH IT WILL BE MINDFUL OF IN ITS FORTHCOMING NEGOTIATIONS WITH THE GDR. (B) USG DOES NOT VIEW THE 1962 STATEMENT AS DEALING IN ANY DEFINITIVE WAY WITH THE BROAD ISSUE OF GERMAN NATIONALITY OR AS CONSTITUTING A COMPREHENSIVE REGULATION OF THE SCOPE OF FRG CONSULAR JURISDICTION IN THE UNITED
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STATES.

6. EMBASSY MAY INFORM FONOFF CONTACTS ON CONFIDENTIAL BASIS THAT DEPT HOPES TO CONCLUDE ITS STUDY OF FRG POSITION ON CONSULAR REPRESENTATION SHORTLY AND TO BE ABLE TO PROVIDE REQUESTED ORAL RESPONSES BEFORE NEGOTIATIONS WITH GDR BEGIN. WE HAVE NO RECORD OF A PAST PRACTICE OF G.D.R. CITIZENS BEING DETAINED IN THE U.S. AND, THEREFORE, NO PAST PRACTICE OF F.R.G. PROVIDING CONSULAR PROTECTION IN THIS SITUATION. F.R.G. HAS THOSE RIGHTS ITS CONSULAR AGREEMENTS WITH US PROVIDE. APPROACH SET OUT IN PARA 3(A), (B) AND (C) ABOVE IS BEST BASIS WE SEE FOR ACCOMMODATING F.R.G. WITHIN EXISTING LEGAL FRAMEWORK. EMBASSY MAY CONVEY GIST OF THAT APPROACH AS PRESENT WORKING LEVEL THINKING.

EMBASSY VIEWS ON THIS APPROACH SOONEST WOULD BE WELCOME.

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